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In the

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN V. ARVANIS, d/b/a INDUSTRIAL CONTRACTORS and BAER ELECTRIC CO., INC.,

Petitioners,

vs.

NOSLO ENGINEERING CONSULTANTS, INC., NOSLO ENGINEERING CORPORATION, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the United States of America may be sued pursuant to the Miller Act, 40 U.S.C. § 270a-270e (1976), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), for its failure to secure a Miller Act bond prior to awarding a federal construction contract to a prime contractor who subsequently defaulted without paying the subcontractors.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

John J. Arvanis, d/b/a Industrial Contractors and Baer Electric Co., Inc., an Illinois corporation, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (App. A. *infra,* pp. 1a-6a) is not officially reported. The opinion of the Court of Appeals (App. B, *infra,* pp. 7a-20a) is reported at 739 F.2d 1287.

JURISDICTION

The judgment of the Court of Appeals denying petitioners' Request for a Rehearing was denied on August 27, 1984 (App. C, *infra,* pp. 21a-22a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

40 U.S.C. Section 270(a) and 270(b) and 28 U.S.C. Section 1346(b), as set forth in Appendix D, *infra,* pp. 23a-26a.

STATEMENT OF FACTS

Respondent, Noslo Engineering Consultants, Inc. ("Noslo"), was the prime contractor for the construction of a "noise attenuator" at the Rock Island, Illinois, United States Army Arsenal. Petitioners, John V. Arvanis ("Arvanis") and Baer Electric Company, Inc. ("Baer") were subcontractors. Unbeknownst to them, Noslo failed to obtain a payment bond, as required under the Miller Act. Noslo also failed to complete the project or pay the two subcontractors for the materials and services they had supplied, and subsequently filed for bankruptcy. Arvanis and Baer then filed essentially identical suits against Noslo and the United States, each seeking to recover the full amount of his damages ($105,080.00 for Arvanis and $30,464.00 for Baer) from each defendant.[1] Noslo failed to answer, and default judgments were entered. The claims against the government were dismissed on grounds of sovereign immunity and lack of subject matter jurisdiction.

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[1] Although never formally consolidated before the District Court, the two cases were treated jointly. The cases were consolidated on appeal.

Arvanis and Baer appealed to the United States Court of Appeals for the 7th Circuit the District Court's decision dismissing their three-count Amended Complaint against the United States. Count III was based on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), and alleged that the government was negligent in failing to require Noslo to post a Miller Act payment bond. Count IV, premising jurisdiction on the Miller Act, 40 U.S.C. § 270a-170e ("Miller Act"), and 28 U.S.C. § 1331 (federal question jurisdiction), also alleged a failure to require the payment bond. Count V again claimed to base jurisdiction on § 1331 and the Miller Act, and alleged both that the government was negligent in failing to retain sufficient progress payments and should thus be liable to the subcontractors and that petitioners should be compensated out of the $50,000.00 retainage which the government did hold. On appeal, petitioners argued that the suits were improperly dismissed as the United States had implicitly waived sovereign immunity under the Miller Act or the FTCA, or both.

On August 27, 1984, the petitioners' Motion for Rehearing with Suggestions for Rehearing *en banc.* in the United States Court of Appeals for the 7th Circuit was denied.

REASONS FOR GRANTING THE WRIT

I.

THE REFUSAL OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO FIND THAT THE MILLER ACT WAIVES SOVEREIGN IMMUNITY AND PERMITS THE SUIT AT BAR HAS IMMEDIATE IMPORTANCE BEYOND THE PARTICULAR FACTS AND PARTIES INVOLVED IN THIS CASE.

Section 270a of the Miller Act permits suits against the United States such as those filed by petitioners in the cases at bar. That section provides in part as follows:

> "*Before any contract, exceeding* $25,000 in amount, for the construction . . . of any . . . public work of the United States *is awarded to any person, such person shall furnish to the United States the following bonds,* which shall become binding upon the award of the contract . . .:
>
> "(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, . . .
>
> "(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. . . ." (Emphasis added.)

Unlike private construction projects, no mechanic's or materialmen's liens can be attached to the public buildings or grounds of the United States. This creates two problems:

> (1) "[P]otential subcontractors would be very reluctant to participate if they had nothing better than

the status of a general creditor of the prime contractor to secure payment," *Arvanis* v. *Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1289 (1984), and would thus be subject to great losses at the hands of insolvent or dishonest contractors; and

(2) The insecurity resulting from the absence of a lien to secure payment has a substantial tendency to drive up the prices at which labor and materials would be furnished on public projects. *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 58 L.Ed. 1394, 34 S.Ct. 803 (1913).

As the Court of Appeals recognized, "[T]he answer to the[se] problem[s] was the Miller Act." *Arvanis* v. *Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1289 (1984). The Congressional intent was clearly to substitute the obligation of a payment bond for the security which might otherwise be obtained by attaching a lien to the property of an individual thus ensuring that subcontractors on federal projects are protected to the same extent as they would be if constructing the improvement for a private individual under like circumstances. The purpose of the law is further emphasized in its title, which declares that it is:

> "For the protection of persons furnishing materials and labor for the construction of public works."

Despite this clear legislative intent, despite recognition of the problems which this Act was clearly intended to answer, and despite the liberal construction of the Act applied by this Court, (*See, e.g., United States for the Use of Hill* v. *American Surety*, 200 U.S. 197, 50 L.Ed. 437, 265 S.Ct. 168 (1905)), the Court below strained the words and clear meaning of the Act to provide not only

that the Act does not answer the very problems which it seeks to redress but also to hold that there exists a "gap in the statute" between the rights given to subcontractors and the remedy provided.

The Court below interpreted the Miller Act to "place no affirmative obligation on the government, and says absolutely nothing about what happens when the contractor fails to furnish the bond." *Arvanis* v. *Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1290 (1984). Appellants respectfully disagree and direct this Court's attention to the plain words of the statute and their ordinary meaning. "*Before* any contract is awarded to any person, such person shall furnish to the United States . . . a payment bond . . ."

Congress was clearly dictating simple, non-discretionary instructions to government employees acquiring goods or services for a public works project:

> "Unless and until you receive a bond to secure payment to subcontractors, do not award any contract to a contractor!"

The statute clearly places the obligation on the government to award a contract only *after* a payment bond has been furnished. Furthermore, only the government, through its contracting officers, has the power to "award a contract for the construction of any public work." To state that "there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement" begs the question, strains the clear language of the Act and undermines the entire purpose of the statute. There is no discretionary function involved but rather a simple and direct duty owed.

The obvious and natural remedy for the right created is to permit suit under the Miller Act by the laborers and materialmen to the same extent as if the government's contracting officer had required the bond prior to awarding the contract. To state that laborers and materialmen who have relied on the bonding requirements imposed by the Act are "hapless" and either intended by Congress (or carelessly permitted) to be "left holding the bag" on a federal construction project is to turn the principals of judicial construction on their ear. 739 F.2d at 1288.

Faced with two possible constructions of the statute, one which reaches a just result in accord with the express purpose of the Act and the other which reaches a universally conceded unjust result at odds with the intent of the law, the court should opt for the just result. "A subcontractor who fulfills his part of the bargain should not suffer either because the prime contractor defaulted" or because the government contracting officer improperly awarded a contract without obtaining the payment bond required by the Miller Act. *Id.* at 1293.

II.

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH ESTABLISHED PRINCIPLES OF FEDERAL LAW, AS ELUCIDATED IN THIS COURT'S DECISIONS IN *INDIAN TOWING CO.* **v.** *U.S.*, **360 U.S. 61 (1955),** *UNITED STATES OF AMERICA* **v.** *YELLOW CAB CO.*, **340 U.S. 543 (1950), AND** *UNITED STATES* **v.** *S.A. EMPRESA DE VIACAO AEREA RIO GRANDESE (VARIG)*, ... **U.S.** ....., **81 L. Ed.2d 660 (1984).**

The Seventh Circuit Court of Appeals rejected appellants' arguments supporting the imposition of liability on the United States under the FTCA for failure to require

a Miller Act bond before awarding and proceeding on the public works construction project. In doing so, the Court premised its decision on the following three reasons:

1. "The absence of any persuasive analogy with private conduct." *Id.* at 1292.

2. "It would allow appellants to achieve by indirection a result which they could not reach directly under the Miller Act." *Id.*

3. The "good Samaritan" rule, as set forth in Section 324A of the Restatement of Torts (Second) was not applicable because "it isn't even clear that the United States undertook any duty," *Id.* at 1291, because the reliance by appellants was not justified and because Section 324A was "primarily applicable to situations in which defendant has undertaken to provide services that are necessary for a third party's physical safety." *Id.*

Petitioners respectfully contend that these reasons are incorrect and misguided.

The lower Court's application of the "analogy with private conduct" rationale is artificial and strained. As the lower Court recognized, the FTCA was designed primarily to remove the sovereign immunity of the U.S. from suits in tort and, with certain specific exceptions, to render the U.S. liable in the same way a private individual would be under like circumstances. *Indian Towing Co.* v. *U.S.*, 350 U.S. 61 (1955). The Supreme Court has often recognized that the FTCA waives the government's immunity from suit in sweeping language in favor of an injured party. *See, e.g., United States of America* v. *Yellow Cab Co.*, 340 U.S. 543 (1950). Based on this under-

standing, the Court of Appeals in the instant case initially proceeded with a thoughtful analysis and rejected the "simple syllogistic analysis" adopted by three other circuits because that analysis merely assumes the answer. 739 F.2d at 1290. The Seventh Circuit further correctly rejected the "uniquely governmental function" argument likewise rejected by the Supreme Court in *Indian Towing Company* v. *United States,* 350 U.S. 61 (1955), and correctly adopted the *Indian Towing* approach of "focus(ing) on the behavior involved, not the legal labels applied, and then look(ing) for analogies with private conduct." 739 F.2d at 1290. The Court, however, became myopic in applying that test.

Indian Towing, 350 U.S. 61 (1955), involved a claim under the FTCA for damages to cargo aboard a ship that ran aground due to the alleged negligent operation of a lighthouse by the Coast Guard. The government argued that the Act contained an implied exception from liability for "uniquely governmental functions." In rejecting that argument, the Supreme Court held.

> "The government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual 'under the same circumstances.' But the statutory language is 'under like circumstances.'" *Id.* at 64.

The Court of Appeals in the case at bar concedes that the government's argument herein "bears some similarity to that rejected in *Indian Towing Co.* v. *United States* . . ." 739 F.2d at 1290, n.3. Clearly, the comparable conduct on which to focus in the case at bar is *construction* of improvements on real estate. Private individuals do it. If they carelessly fail to require their prime contractor to post a bond as part of the contract

prior to commencing construction, private individuals are subject to mechanic's and materialmen's liens. Similarly, the government is liable if it fails to secure a Miller Act bond from its prime contractor because those bonds were intended by Congress to ensure that subcontractors on federal projects are *protected to the same extent as they would be in constructing the improvement for a private individual under like* circumstances.

Despite this avowed focus and analysis, the Court in the case at bar erred in application and reverted to the application of the rejected uniquely governmental function approach as follows:

> "Similarly, there is nothing uniquely governmental about construction contracts, but it is true that *federal* contracts are unique, and that the Miller Act with its bonding requirement applies only to federal contractors. Thus, it is true that no Miller Act question could arise under state law." 793 F.2d at 1290, n.3.

Additionally, in the case of *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 95 U.S. App. DC 189, 221 F.2d 62, *aff'd per curiam sub. nom. United States v. Union Trust Co.*, 350 U.S. 907, 100 L.Ed. 796, 76 S.Ct. 192 (1955), and in the very recent decision in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*VARIG*), ... *U.S.* ..... 81 L.Ed.2d 660 (1984), the Supreme Court relied on *Indian Towing* and rejected the "uniquely governmental function" approach applied herein. In *Eastern, supra,* two planes suffered a mid-air collision while attempting to land, allegedly as a result of the negligence of air traffic controllers. The Supreme Court summarily affirmed the decision to permit suit against the government, rejecting the uniquely governmental function ap-

proach and holding that the nature of the air traffic controllers' function was such that liability under the law of the state where the accident occurred would be imposed on the government under like circumstances. This reasoning was cited with approval in *VARIG, supra,* which is distinguished from the case at bar because VARIG deals with the "discretionary function exception which was never raised in this case because the government, by the terms of the Miller Act, is not permitted the discretion to award a contract to a contractor who fails to secure a payment bond;[2] rather, the award of the contract is predicated on the contractor having a bond. Once again, under the Miller Act there is no discretionary function involved but rather a simple and direct duty owed. Therefore, proper application of the *Indian Towing* rationale which is on all fours with the case at bar results in reversal of the lower Court's decision.

Secondly, the rationale that to permit the suit at bar under the FTCA allows appellants to achieve by indirection a result which they could not reach under the Miller Act simply assumes the answer to the question posed by the Seventh Circuit. Analysis of the language and intent of both the FTCA and the Miller Act indicates they are proper vehicles to redress the very result which the Court of Appeals and the District Court repeatedly, and apologetically, refer to as "unjust." 739 F.2d 1293. Once again this Court should be guided by the beacon of *Indian Towing,* where this Court held:

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[2] "Before any contract, exceeding $25,000 in amount, for the construction . . . of any . . . public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds . . ." 40 U.S.C. §270(a).

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Indian Towing,* 350 U.S. at 68-69.

In sum, had the United States performed the duty delegated to it by the Miller Act by the simple expedient of insuring that the required bonds had been obtained, this litigation would be unnecessary and the injustice referred to by the two lower courts would not have been done. In balancing the burden to the government in exercising its duty to require statutory bonds against the burden upon hapless subcontractors who are left "holding the bag", this Court must tip the scale in favor of the subcontractors.

Third, the rejection of the "good Samaritan" rule[3] is unfounded as to the duty owed to subcontractors by the government.[4] The Miller Act clearly imposes an affirma-

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[3] The "good Samaritan" rule is found in the Restatement of Torts (Second) § 324A and is adopted as a rule of substantive law in Illinois. *See, e.g., Pippin* v. *Chicago Housing Authority,* 78 Ill.2d 204, 399 N.E.2d 596, 35 Ill.Dec. 121 (1979). Under this theory, the United States, knowing that a third party (the subcontractor) would be affected by its direct dealings with the prime contractor, had gratuitously undertaken a duty of care towards the subcontractor, and can be held liable for a breach of that duty.

[4] In another decision of the Seventh Circuit Court of Appeals regarding the "good Samaritan" doctrine, the Court held, in a divided decision, that a cause of action existed under the FTCA when a regulatory agency's

tive duty on government contractors to secure payment bonds for subcontractors *before* awarding contracts, as explained in the first section of this Petition. Failure to do so subjects the government to the same liability as would be imposed under state law on private individuals in like circumstances.

Further, the lower Court improperly rejected the "good Samaritan" doctrine based on a fact-finding of unjustified reliance. At this stage no facts have been determined. Thus, this conclusion is not justified by the record. Furthermore, the Court's characterization of appellants' conduct as "passive reliance" is grossly unfair and inaccurate. Contrary to the Court's assumption, assisting in construction of a complex government project such as the noise-attenuator on the Rock Island Arsenal is strikingly similar to navigating around submerged rocks. Obviously, the captain could have weighed anchor and

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[4] (Continued)

negligent enforcement of safety regulations increased the risk of harm to third persons and proximately caused an injury. *Hylin* v. *United States*, 715 F.2d 1206 (7th Cir. 1983).

Judge Bauer, a member of the panel in the instant case, dissented in *Hylin, supra,* writing that no cause of action existed. Clearly, the *Hylin* case involved the discretionary function exception to the FTCA and would have been decided differently under the *VARIG* analysis.

It is ironic that the decision in the instant case was delayed for over one year while the Seventh Circuit awaited the decision of this court in *United States* v. *VARIG,* ..... U.S. ....., 81 L.Ed.2d 880 (1984), and decided immediately after the publication of *VARIG.*

The instant case, however, does not involve the discretionary function exception to the FTCA and the cause of action stated in the complaint should be held to properly state a cause of action against the government.

waited out the storm or radioed to determine if the lighthouse was working in the *Indian Towing* case. In the case at bar, the Court suggests that the appellants could have inquired of the contracting officer whether a payment bond had been posted. However, the subcontractors are familiar with the requirement that before they can enter into a sensitive government defense installation to work on a substantial construction contract, the government must *award* a contract. Furthermore, subcontractors know that as a prerequisite to the award, the government must have obtained the Miller Act payment bond to secure payment of subcontractors. Until those two steps have been completed, no mechanic or materialman should be allowed onto the installation to commence construction under the contract.

The Court of Appeals in the case at bar improperly rejected the "good Samaritan" doctrine because Section 324a was *primarily* applicable to provide services that are necessary for a third party's *physical* safety. However, the case cited as the "classic example" of the federal government's liability for damages caused by the misfeasance of government employees' conduct is *Indian Towing,* which involved a claim for damaged *cargo,* not personal safety. Additionally, it should be emphasized that a finding of the applicability of that doctrine to the case at bar is not indispensable. Here, the duty imposed arises expressly from the Miller Act or by fair implication from the combination of the Miller Act, the FTCA and the Illinois Mechanics Lien Act.

Furthermore, the lower Court attempts to distinguish *Indian Towing, supra,* from *VARIG, supra,* by noting that the Supreme Court in *VARIG* emphasized that

FAA rules, regulations, certifications and spot checks were, by Congressional emphasis, intended only "to *promote* safety in air transportation, not to insure it." *VARIG, supra,* 81 L.Ed.2d at 679; 739 F.2d at 1291, n.4. To openly suggest as the Court of Appeals does that, "perhaps the Miller Act likewise does no more than encourage government contracting officers to insist that contractors obtain Miller Act bonds" (739 F.2d 1291, n.4) flies directly in the face of the express Congressional purpose of *insuring* that subcontractors on federal projects are protected to the same extent as they would be if constructing the improvement for a private individual under like circumstances, a purpose strikingly analogous to the FTCA. As further proof of the insurance feature, the Miller Act bond requirement, which also requires a performance bond, is designed to *insure* that the project will be properly completed so that the taxpayers' money will not be wasted as it was in the case at bar.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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November 1984

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 82-4025

JOHN V. ARVANIS, d/b/a INDUSTRIAL CONTRACTORS,
Plaintiff,

v.

NOSLO ENGINEERING CONSULTANTS, INC., NOSLO ENGINEERING CORPORATION and the UNITED STATES OF AMERICA,
Defendants,

and

No. 82-4026

BAER ELECTRIC CO. INC., an Illinois Corporation,
Plaintiff,

v.

NOSLO ENGINEERING CONSULTANTS, INC., NOSLO ENGINEERING CORPORATION and the UNITED STATES OF AMERICA,
Defendants.

ORDER

(FILED MAR 22 1983)

This case is once again before the Court, now on the United States' motion to dismiss Count V of the amended complaints of Plaintiffs Arvanis and Baer. Initially, it should be noted that Defendant, United States of America, in its Motion for Relief from Order, claims that it was not served with a motion to amend or an amended complaint by Plaintiff Baer. The docket sheet to the Baer case indicates that both the motion and the amended complaint were filed. Since the issues in both cases are

identical and the Court can see no prejudice to the Defendant, the Motion for Relief from Order is denied and this Order will apply to both cases.

Previously, Counts III and IV of the amended complaints were dismissed by this Court (see docket entry dated Jan. 19, 1983) and, for the following reasons, Count V is now dismissed. Count V seeks recovery on the same basis as Counts III and IV but alleges in addition, that the United States is holding a retainage fund to which Plaintiffs are entitled and the United States failed to retain as much money under their contract with Noslo as they should have considering the circumstances of the case.

The United States has moved to dismiss Count V based on alternative arguments. First, if Count V is treated as a tort claim, Defendants argue that Plaintiff has failed to meet the jurisdiction requirements of the Federal Torts Claim Act and, even if these requirements have been met, the Court has rejected this theory of recovery in its prior order. Alternatively, if Count V is considered a contract claim, as Defendant believes it should, the Count must be dismissed based on several Court of Claims rulings to that effect.

Plaintiff argues that the tort-contract issue need not be resolved because this case is based on federal question jurisdiction and the implicit waiver of soverign immunity contained within the Miller Act. Furthermore, Count V can be distinguished from those Counts simply alleging negligence against the United States for failure to require a bond, but not alleging the existence of a retainage fund.

The Court finds that the motion to dismiss should be granted based on its previous ruling (see Order dated Dec. 6, 1982). Jurisdiction for Count V is based on the Miller Act (40 U.S.C. §270) and on federal question jurisdiction (28 U.S.C. §1331). In the previ-

ous ruling, it was held that neither of these statutes expressly waived the sovereign immunity of the United States from suits filed against it. The fact that a retainage is alleged to have been held by the government does not act to waive that immunity. A ruling to the contrary would create a distinction between those situations where a retainage is held and those where it is not, a distinction that is not to be found in any of the cited statutes.

A case that is closely analogous to the present situation was *United States Fidelity and Guarantee Company, et al.* v. *United States*, 201 Ct. Cl. 1, 475, F.2d 1377 (1973) (USFG). There the subcontractors were attempting to recover for nonpayment of bills by the prime contractor. The fund provided by the surety's payment bond, as required by the Miller Act, was insufficient to pay all the subcontractors. Thus, those that had not been paid instituted a suit against a retainage fund held by the United States. The Court examined the standing of the subcontractors to bring suit against the United States and, in so doing, reviewed the two most important Supreme Court opinions on this issue. In the first of these cases, *United States* v. *Munsey Trust Company*, 332 U.S. 234 (1947), the Court decided whether the United States or a payment bond surety had superior right to a retained fund held by the government. The Court held that while the surety did have a right to the fund, the United States could offset from the fund amounts owed to the government from the prime contractor for work previously done. In the course of its opinion, the Court held "laborers and materialmen do not have enforceable rights against the United States for their compensation". *Munsey*, 332 U.S. at 241.

The later case of *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132 (1962), discussed the issue of whether the contractors trustee in bankruptcy or a Miller Act surety had superior rights in a retainage fund held by

the government. The Court held that the surety, having paid the laborers and materialmen, was entitled to the benefit of all the rights necessary to reimburse it for its payment. The Court stated:

> ". . . the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become entitled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it."

In comparing these two cases, the Court in *USFG* made the following observation:

> "It is a short step from *Pearlman* to infer that if the subcontractors have rights to which the surety may be subrogated, then the subcontractors should be able to assert their rights directly, which is in complete conflict with the language in *Munsey,* as recognized by Justice Clark's concurring opinion in *Pearlman.*
>
> The dilemma may be resolved in a number of ways, but the most apparent might be by noting that the Court in *Pearlman* stated that the surety was entitled to the benefit of all the rights of the laborers and materialmen whose claims it paid and those of the contractor whose debts it paid. The surety then is subrogated to the rights of the contractor who could sue the Government since it was in privity of contract with the United States. The surety is likewise subrogated to the rights of the laborers and materialmen who might have superior equitable rights to the retainage but no right to sue the Defendant. If this interpretation of *Pearlman* is adopted then *Munsey* is in complete harmony with it and the

> *Pearlman* decision is of no aid to these subcontractors."

The Court finds that this is a proper interpretation of the holdings of these two cases. In this way the subcontractor would have equitable rights which would be superior to those of other claimants to a fund. Yet, as noted by the *Munsey* Court, the subcontractor could not take action directly against the United States to recover on such funds. There has been no case in which a subcontractor has recovered directly against the United States based on a retainage fund. The only Supreme Court cases dealing with this issue have weighed the competing claims of private parties to the fund.

The holding of *USFG* was examined and upheld by the Court of Claims in *United Electric Corp.* v. *United States,* 647 F.2d 1082 (Ct. Cl. 1981), cert. denied 454 U.S. 863. The Court in *United Electric* felt compelled to review the *USFG* decision in light of *Kennedy Electric Co. Inc.* v. *United States Postal Service,* 508 F.2d 954 (10th Cir. 1975).

In *Kennedy,* the Plaintiff was a subcontractor on a federal postal facility project. As with this case, there had been no Miller Act bonds furnished, the prime contractor subsequently went bankrupt, and the Postal Service held funds retained during the life of the contract. The Court held that *Kennedy* had an equitable right to the retainage and could enforce its rights directly against the Postal Service. The Tenth Circuit distinguished *USFG* by stating:

> "We do not have a standing question. Our suit is against an independent establishment having the power to sue and be sued."

Consequently, while many of the facts in *Kennedy* are identical to those presented in this Court, the critical

issue of standing to sue was not addressed. However, this was precisely the issue in *United Electric* and the Court, affirming *USFG*, ruled that a subcontractor had no standing to sue the United States for compensation due.

Accordingly, the Court must dismiss the case based on the present law on this issue, even though the Court does not believe this to be a totally equitable result. A subcontractor should be able to rely on the Miller Act and be assured that a bond will be furnished.

Notwithstanding, IT IS ORDERED that the motion to dismiss is GRANTED and the complaint is DISMISSED.

ENTERED: March 22nd, 1983.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX B

JOHN V. ARVANIS, d/b/a INDUSTRIAL CONTRACTORS,
Plaintiff-Appellant,

v.

NOSLO ENGINEERING CONSULTANTS, INC., NOSLO ENGINEERING CORPORATION, and the UNITED STATES OF AMERICA,
Defendants-Appellees.

BAER ELECTRIC CO. INC., an Illinois Corporation,
Plaintiff-Appellant,

v.

NOSLO ENGINEERING CONSULTANTS, INC., NOSLO ENGINEERING CORPORATION and the UNITED STATES OF AMERICA,
Defendants-Appellees.

Nos. 83-1670, 83-1766

United States Court of Appeals,
Seventh Circuit.

Submitted July 2, 1984.*

Decided July 31, 1984.

Rehearing and Rehearing En Banc
Denied Aug. 27, 1984.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed.R.App.P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

Subcontractor brought action against government to recover payment on federal construction project after prime contractor had defaulted without paying and without obtaining payment bond. The United States District Court for the Central District of Illinois, Michael M. Mihm, J., dismissed the claims, and subcontractor appealed. The Court of Appeals held that: (1) requirement of Miller Act for public contractors to obtain performance and payment bonds placed no affirmative obligation on the government and thus could not provide basis for subcontractor's claim, and (2) government was not liable under Federal Tort Claims Act for failing to ensure that the payment bond was posted.

Affirmed.

1. United States — 67(1), 74½

Requirement of Miller Act that public contractors obtain performance and payment bonds places no affirmative obligation on the government to ensure that the bonds have been obtained and thus provides no basis upon which subcontractor may bring suit against the government for payment when prime contractor has failed to obtain bonds and has defaulted without paying the subcontractor. Miller Act, § 2(b), 40 U.S.C.A. § 270b(b); 28 U.S.C.A. § 1331.

2. United States — 78(8)

Government was not liable under Federal Tort Claims Act to subcontractor on federal construction project for negligently failing to ensure that prime contractor had obtained payment bond where subcontractor could have inquired of contracting officer whether payment bond had been posted and thus could not be said to have reasonably relied on government's ensuring that the bond had been posted and where there was no persuasive analogy with private conduct upon which government's liability could be based. 28 U.S.C.A. § 1346(b).

3. United States — 74½

Subcontractor could not bring action against government against retainage fund to recover payment on federal construction project on which prime contractor had defaulted without obtaining payment bond and without paying subcontractor where there was no evidence that the retainage fund had not been expended to complete the project.

Samuel S. McHard, Katz, McAndrews, Durkee, Balch & Lefstein, Rock Island, Ill., Richard W. McCarthy, Kolckau, McCarthy, Ellison, Rinden & Hartsock, Rock Island, Ill., for plaintiffs-appellants.

Gerald D. Fines, U.S. Atty., Springfield, Ill., L. Lee Smith, Asst. U.S. Atty., Peoria, Ill., Major Thomas G. Bowe, Headquarters Dept. of Army, DAJA-Ltd., Washington, D.C., for defendants-appellees.

Before BAUER, CUDAHY and ESCHBACH, Circuit Judges.

PER CURIAM.

The ultimate question we are asked to decide is who is left holding the bag when a prime contractor on a federal construction project fails to obtain a Miller Act payment bond and then defaults without paying his subcontractors. We conclude that the answer is the hapless subcontractor, not the United States.

I.

On a private construction project, mechanic's and materialmen's liens secure payment of the subcontractors. Such devices are obviously unavailable on a government project; sovereign immunity bars liens against government property. Equally obvious, potential subcontractors would be very reluctant to participate if they had nothing better than the status of a general creditor of the prime

contractor to secure payment. The answer to this problem was the Miller Act, 40 U.S.C. §§ 270a-270d, 49 Stat. 793 (1935) (as amended). Section 270a provides that the prime contractor must post a payment bond to guarantee payment of the subcontractors. Section 270b provides that if not paid, the subcontractor may sue on the bond in federal district court.

Defendant Noslo Engineering Consultants, Inc. was the prime contractor for the installation of a "noise attenuator" at the Rock Island, Illinois United States Army arsenal. Plaintiffs-appellants John V. Arvanis and Baer Electric Co., Inc. were subcontractors. Unbeknownst to them, Noslo failed to obtain a payment bond. Noslo also failed to complete the project or pay the two subcontractors for the materials and services they had supplied, and subsequently filed for bankruptcy. Arvanis and Baer then filed essentially identical suits against Noslo and the United States, each seeking to recover the full amount of his damages ($105,080 for Arvanis and $30,464 for Baer) from each defendant.[1] Noslo failed to answer, and default judgments were entered. The claims against the government were dismissed on grounds of sovereign immunity and lack of subject matter jurisdiction.

Arvanis and Baer appeal from the district court decision dismissing their three-count amended complaint against the United States. Count III was based on the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, and 28 U.S.C. § 1346(b), and alleged that the government was negligent in failing to require Noslo to post a Miller Act payment bond. Count IV, premising jurisdiction on the Miller Act and 28 U.S.C. § 1331 (federal question jurisdiction), also alleged a failure to require the payment bond. Count V again claimed to base

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[1] Although never formally consolidated before the district court, the two cases were treated jointly. The cases have been consolidated on appeal.

jurisdiction on § 1331 and the Miller Act, and alleged both that the government was negligent in failing to retain sufficient progress payments and should thus be liable to the subcontractors, and that plaintiffs should be compensated out of the $50,000 retainage which the government did hold.[2] On appeal, plaintiffs continue to argue that the suits were improperly dismissed as the United States had implicitly waived sovereign immunity under the Miller Act or the Tort Claims Act, or both.

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[2] The original identical five-count complaints were filed April 14, 1982. Counts I and II alleged fraud and breach of contract against Noslo Engineering, and were premised on diversity jurisdiction. Noslo never appeared, and a default judgment for the full amount of the claim (presumably uncollectible) was entered early in the proceedings; Noslo is not involved in this appeal. Counts III, IV, and V were directed at the United States, and the only jurisdictional basis cited was the Miller Act. Count III alleged negligence on the part of the federal contracting officer who failed to insist on the posting of a Miller Act payment bond. Count IV alleged an oral contract between the United States and the subcontractors; this count was voluntarily dismissed. Count V argued unjust enrichment. The government argued that the Miller Act did not waive sovereign immunity, and that any recovery would have to be based on the Federal Tort Claims Act. The case proceeded on both Miller Act and FTCA theories, and was dismissed on December 7, 1982 for lack of jurisdiction under either the Miller Act or the FTCA. On December 17, 1982, plaintiffs requested leave to amend the complaints to conform to the issues actually heard and decided. Leave to amend to substitute the three new counts was granted on January 31, 1983, and new Counts III and IV were simultaneously dismissed. After briefing on the new Count V (the retainage issue), it too was dismissed on March 22, 1983. Plaintiffs then filed the present timely appeal.

II.

Count IV: Negligence Under the Miller Act

[1] Appellants argue that the Miller Act requires the government to insist that its contractors furnish Miller Act payment bonds. This is incorrect. The statute requires only that contractors obtain performance and payment bonds. The statute places no affirmative obligation on the government, and says absolutely nothing about what happens when the contractor fails to furnish the bond. The Act grants a very narrow and specific right to those in appellants' position: the right to sue on the bond (if there happens to be one) "in the name of the United States for the use of the person suing." 40 U.S.C. § 270b(b). (The United States is thus aligned on the plaintiff's rather than the defendants' side by the equation, providing an additional reason for concluding that the United States cannot properly be a defendant in a Miller Act suit.) There is clearly no waiver of sovereign immunity here. There does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement. However, this is not a gap that we can fill with a remedy—especially in view of the very narrow remedy actually granted by the statute. No citation is needed to reject appellants' suggestion that 28 U.S.C. § 1331 waives sovereign immunity. It merely gives the district court jurisdiction to hear federal claims that are not otherwise barred.

Count III: Negligence Under the Tort Claims Act

[2] Three other circuits presented with a Tort Claims Act suit against the United States for failure to require a Miller Act bond have given the argument short shrift, deciding it on the basis of a simple syllogism. The FTCA provides that the government may be sued in tort only in "circumstances where the United States, if a private person, would be liable to the claimant in accor-

dance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976). Because the Miller Act deals with federal contracts, a private party could never be in a position to require a Miller Act bond, and thus of course could never be liable for failure to require the bond. In the absence of such liability, the analogy required for governmental liability under the FTCA never comes into play.[3] *McMann* v. *Northern Pueblos Enterprises, Inc.,* 594 F.2d 784 (10th Cir. 1979); *Devlin Lumber and Supply Corp.* v. *United States,* 488 F.2d 88 (4th Cir. 1973); *United States* v. *Smith,* 324 F.2d 622 (5th Cir. 1963). This Circuit has not previously been faced with the question.

We think the syllogistic analysis assumes the answer to the question at issue. It should be possible to define governmental action in almost any situation narrowly enough to render it "uniquely governmental" (e.g., no private party could negligently drive a truck carrying the U.S. mail). The better approach is to focus on the behavior involved, not the legal labels applied, and then

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[3] The argument bears some similarity to that rejected in *Indian Towing Company* v. *United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). The Coast Guard voluntarily undertook to operate a lighthouse on Chandeleur Island. The light was out, and a barge owned by plaintiff ran aground and was wrecked. The Supreme Court held that plaintiff could maintain a negligence suit under the Tort Claims Act. While lighthouse operation was done only by the Coast Guard, there is nothing uniquely governmental about this service. At other times and places (e.g., England) lighthouses have been privately maintained, financed by fees from shipping companies desiring the service. Similarly, there is nothing uniquely governmental about construction contracts, but it is true that *federal* contracts are unique, and that the Miller Act with its bonding requirement applies only to federal contractors. Thus it is true that no Miller Act question could arise under state law.

look for analogies with private conduct. For example, private parties in many situations are required by contract or by state law to obtain bonds—and often fail to do so.

Appellants argue that Illinois has adopted the "good Samaritan" rule as set forth in Section 324A of the Restatement of Torts (Second). Under this theory, the United States, knowing that a third party (the subcontractor) would be affected by its direct dealings with the prime contractor, had gratuitously undertaken a duty of care towards the subcontractor, and can be held liable for a breach of that duty. Appellants specifically argue that this case is analogous to *United Scottish Ins. Co.* v. *United States,* 692 F.2d 1209 (9th Cir. 1982), in which the United States was held liable under the FTCA for injuries resulting from an airplane crash; Federal Aviation Administration (FAA) inspectors were negligent in certifying that the aircraft met fire safety standards. The government argued that there was no private activity analogous to an FAA inspection. The Ninth Circuit, applying the good Samaritan (Section 324A) doctrine, found liability for a voluntarily assumed, negligently performed duty to third parties (passengers) who were in no position to do anything other than rely on FAA safety inspections. The Supreme Court, however, unanimously reversed in this and a companion case, *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*) v. *United States,* 692 F.2d 1205 (9th Cir. 1982). *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), ... U.S. ....., 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984).[4]

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[4] The case was decided on the "discretionary function" exception to the FTCA. The Court explicitly did not reach the argument that the FAA inspections were purely governmental activity having no counterpart in private conduct. *Indian Towing* was distinguished in that the government there had expressly disavowed any "discretionary function" argument. While *Varig Airlines* nevertheless casts some doubt on the reasoning of *Indian*

Even without the *Varig* reversal, we would find appellants' good Samaritan argument foreclosed. In *Jones* v. *United States,* 703 F.2d 246 (7th Cir. 1983), this Circuit had an opportunity to explore the ramifications of Section 324A, and it is not necessary to repeat the analysis here. Suffice it to say that we concluded that 324A was primarily applicable to situations in which defendant has undertaken to provide services (e.g. inspection or repair services) that are necessary for a third party's physical safety, and which the third party is unable to undertake for himself—due either to lack of expertise or an inability to discern or discover hidden hazards. Reliance by the third party is usually required.[5] In *Jones,*

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[4] (Continued)

Towing, the situations are factually distinguishable. The Coast Guard had publicly opted to operate the lighthouse and published its location on navigation charts and "light lists," and it is customary to keep such lights in continuous rather than intermittent working order. According to the Supreme Court in *Varig Airlines,* FAA safety inspections are made on a spot check basis, most inspections are delegated to industry personnel, and the goal is "promoting safety", not insuring it." The FAA inspection statute is thus largely hortatory. Perhaps the Miller Act likewise does no more than encourage government contracting officers to insist that contractors obtain Miller Act bonds.

The *Varig Airlines* decision is also arguably limited to the regulatory context. However in another part of the opinion, the Court contrasts the situation presented with the "common law torts" that the legislative history indicates the Tort Claims Act was designed to encompass. *See Dalehite* v. *United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). While failure to require a Miller Act bond is not an omission made in the course of regulation, neither is it a garden variety tort.

[5] *Indiana Towing* provides the classic example of this paradigm. *See Jones, supra,* n. 10 at 251, for a further discussion of this case in the context of Sections 323 and 324A of the Restatement.

we concluded that the United States was not liable for a slip and fall accident on a sidewalk adjacent to a United States Post Office. While postal employees routinely swept the walk clear of gravel, this gratuitous undertaking—although public-spirited—was not "necessary" for anyone's safety (and in no way worsened the situation), and plaintiff was in as good a position as anyone else to determine the safety of the walk. For similar reasons, we reject appellants' arguments under § 324A. First, it isn't even clear that the United States undertook any duty. It merely executed a contract (in retrospect, ill-advised) with Noslo. Even assuming that the subsequent effect of that contract on the subcontractors amounts to the sort of affirmative assumption of duty contemplated by § 324A (the real problem here being nonfeasance or a lack of supervision by the government, while the good Samaritan doctrine refers to misfeasance —by one who needn't have acted at all), appellants need not have passively relied on the government to protect their rights. Unlike the barge captain in *Indian Towing,* plaintiffs were not forced to navigate around submerged rocks. They could have inquired of the contracting officer whether a payment bond had been posted. Any subcontractor is now certainly well-advised to do so.

In the absence of any persuasive analogy with private conduct, we conclude that appellants cannot maintain a Tort Claims action against the United States. We also note an additional reason for rejecting the Tort Claims approach: it would allow appellants to achieve by indirection a result that they could not reach directly under the Miller Act.[6]

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[6] The government also argues that Count III could be dismissed for failure to exhaust (or invoke) administrative remedies. Section 2675(a) of Title 28 provides that a tort claim against the United States shall not be instituted unless the claimant has first presented his claim to the appropriate federal agency and the claim has been

Count V: The Retainage

[3] The argument that the United States is liable because it "should have" paid closer attention to the prime contractor's problems and withheld more of the progress payments is easily dismissed. Appellant argues only Miller Act and federal question jurisdiction for this

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[6] (Continued)

finally denied by the agency. The claimant may construe a failure to rule on the administrative claim within six months as a final denial. Section 2401(b) of Title 28 provides that a tort claim is barred unless plaintiff presents his claim to the agency within two years after the claim accrues, or unless suit is commenced within six months after the final agency denial.

Plaintiff Arvanis filed a complaint with the agency on December 29, 1982. While we don't know exactly when the claim accrued, Noslo did not become the prime contractor until January 8, 1981, less than two years earlier. The filing of the administrative claim was thus timely, but it was not filed until *after* the district court had already dismissed the original complaint dealing with the same claims. While there is an apparent reversal of the proper order for filing administrative claims and civil actions, there is an interesting twist here in that the complaint was not instituted as a tort claim. The tort claims procedures of 28 U.S.C. § 2671 *et seq.* are thus arguably inapplicable. Plaintiff Arvanis thought he was filing suit under the Miller Act, which contains no reference to tort claims procedures; the only problem is that the Miller Act provides no basis for jurisdiction over the United States. It was the district court that conceptualized the case as a tort claim, and decided it on that basis. By the time plaintiff did file a complaint under the FTCA (the amended complaint of January 31, 1983), the administrative claim had been filed, but there was no final denial and six months had not yet passed. The claim was thus premature—but then, having been granted leave to amend his complaint, plaintiff could not very well have delayed an additional five months waiting for either a denial or inaction. As it happened, the claim was denied March 21, 1983, the day

claim, and we have already concluded that neither statute waives sovereign immunity. It might be possible to frame the claim in a manner that would fall within the FTCA; under state law, a party that negligently failed to supervise some activity under its control might well be liable to another party injured thereby. However, such an expansive reading of the Tort Claims Act would swallow up sovereign immunity; in almost any situation, the government "might have" done a better job of keeping track of its affairs. In any event, a successful claim for monies not retained would be just the sort of direct raid on the treasury that provides the classic argument for sovereign immunity. *Land* v. *Dollar,* 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). A narrow exception to sovereign immunity is made for suits seeking injunctive relief for the very reason that no claim on the treasury is involved. *See Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 69 S. Ct. 1457, 93 L.Ed. 1628 (1948); *Clark* v. *United States,* 691 F.2d 837 (7th Cir. 1982).

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[6] (Continued)

before the entire case was finally dismissed, and Arvanis filed the denial with the district court on April 7, 1983, the same day he filed his notice of appeal.

Fortunately we do not need to decide whether the district judge was without jurisdiction to decide the case on the basis of what he recognized to be a tort claim incorrectly denominated a Miller Act claim, or whether plaintiff should (or could) have stalled on amending his complaint. The case is adequately disposed of on review of the grounds actually reached by the district court. (Besides, plaintiff is now time-barred from filing a new suit if this one is dismissed on procedural grounds, and plaintiff should be assured that the outcome would not have been different had the procedural history been less ambiguous.)

There is no indication in the record that plaintiff Baer ever filed an administrative complaint. Again, given the jurisdictional confusion, we will decide the case on the grounds reached by the district court.

The argument for allowing a claim against the retainage is thus superficially more attractive. By hypothesis there is a separate fund—aside from the general treasury—to which plaintiff can look for payment. That was part of this court's rationale in allowing suit in *Schlafly* v. *Volpe*, 495 F.2d 273 (7th Cir. 1974) (suit brought to compel the expenditure of authorized, yet frozen, federal highway funds). In this situation, the separate fund argument evaporates upon closer inspection. Presumably the progress payments are still retained because of the lack of progress on the project. The record indicates that the noise attenuator was unsatisfactory upon installation, and Noslo failed to fix it within the additional 90 days allowed. It seems likely that any retainage would be (has been?) expended in an effort to obtain a functioning noise attenuator, and this brings us back to a direct claim against the treasury. Perhaps this is why plaintiffs cite no cases in which a subcontractor has successfully laid claim to the retainage.[7]

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[7] In *United Electric Corp.* v. *United States*, 647 F.2d 1082 (Ct.Cl.), *cert. denied*, 454 U.S. 863 (1981), the subcontractor sued the government (after the surety refused to pay on the Miller Act bond, which was allegedly inadequate anyway), alleging that the government had negligently failed to comply with the Miller Act, thus creating an equitable lien against the retainage, which was more than adequate to cover the subcontractor's claim. The court concluded that the subcontractor lacked standing to pursue the claim in the Court of Claims (there was no privity of contract with the government), but described this outcome "not a happy result," and stressed that the government might voluntarily make payment and had a moral obligation to do so if funds remained after the contract was completed.

III.

The result is, as the district court put it, unjust. A subcontractor who fulfills his part of the bargain should not suffer because the prime contractor defaulted, and the government contracting officer had not insisted on compliance with the Miller Act. We agree that there is a practical problem (how widespread we do not know) that is not addressed by the Miller Act, but that is a problem that can only be addressed, and redressed, by Congress.

The judgment of the district court dismissing the amended complaint is

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

August 27, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

JOHN V. ARVANIS,
d/b/a, INDUSTRIAL CONTRACTORS,
Plaintiff-Appellant,

No. 83-1670 v.

NOSLO ENGINEERING CONSULTANTS, INC.,
NOSLO ENGINEERING CORPORATION,
and the UNITED STATES OF AMERICA,
Defendants-Appellees.

BAER ELECTRIC CO., INC.,
an Illinois Corporation,
Plaintiff-Appellant,

No. 83-1766 v.

NOSLO ENGINEERING CONSULTANTS, INC.,
NOSLO ENGINEERING CORPORATION,
& THE UNITED STATES OF AMERICA,
Defendants-Appellees.

Appeals from the United States District Court for
the Central District of Illinois,
Rock Island Division.
Nos. 82 C 4025, 82 C 4026
Michael M. Mihm, *Judge.*

ORDER

(Received—Aug 30 1984)

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

Miller Act (40 U.S.C.):

Section 270a. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this action.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

Section 270b. SAME; RIGHTS OF PERSONS FURNISHING LABOR OR MATERIAL.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid

in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him; *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Federal Tort Claims Act (28 U.S.C.):

Section 1346. UNITED STATES AS DEFENDANT.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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